IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17-01-2005

CORAM :

THE HONOURABLE MR. JUSTICE A. KULASEKARAN

C.R.P. (NPD) No. 2120 of 2004
and
C.M.P. No. 15979 of 2004
-o-

V.K.K. Nair ... Petitioner (2nd Defendant)

Versus

Mrs. Kanchan Kawar ... Respondent (Plaintiff)

Revision under Section 115 of the Code of Civil Procedure against the order and decreetal order dated 31-07-2002 on the file of VIII Assistant Judge, City Civil Court, Chennai made in I.A. No. 6786 of 2002 in O.S. No. 6023 of 2001.

For Petitioner : Mr. G. Dhesingu
For Respondent : Mr. A. Venkatesan

ORDER

The second defendant/revision petitioner herein has filed an application under Order 37 Rule 3 (5) of CPC seeking leave to defend the suit, which was dismissed with costs by the court below, hence this revision.

2. The respondent herein has filed the suit for recovery of Rs.28,300/-, based on the promisory note dated 05-10-1998, together with interest on Rs.15,000/- at Rs.2.50% per month from the date of plaint till realisation. The petitioner herein has filed an application praying leave to defend the suit by stating that he never borrowed any money from the respondent herein; that he approached one Gulecha for financial help during April 1997 and borrowed Rs.15,000/- by executing a blank promisory note; that he had discharged the same and requested the said Gulecha to return the Promisory note, who had assured him to return the same; during that period, the Petitioner went to Kottayam, Kerala to attend his ailing mother and stayed there for one year; that after his return from Kerala, the petitioner came to know that the said Gulecha died; that the respondent herein is a stranger and denied the suit claim.

3. The learned counsel for the petitioner submits that there are triable issues involved in the suit and therefore the court below is not justified in dismissing the application on the ground that the petitioner has not produced any documents

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in support of his defence; that the court below ought to have seen only from the affidavit whether a reasonable defence is made out or not and which even need not be a good defence; ignoring the same, the court below erred in deciding the issue against the petitioner at the inception itself as if the petitioner did not raise any proper issue and there is no triable issue and prayed for setting aside the order dated 31-07-2002 passed by the court below.

4. The learned counsel for the respondent relied on a decision of this Court reported in (V.K.K. Nair Vs. D. Shittal Kumar) 2004 (5) CTC 734 wherein it was held that unless the defendant is in a position to show that he has got a triable issue in such money suit and applies on such summons for leave to defend such suit, he would not be permitted to defend the suit unless the defendant is in a position to satisfy the Court that he has a substantial defence to raise or that the defence intended to be put to is raised, it is not incumbent on the part of the Court to grant leave.

5. Rule 3 (5) of Order 37 CPC governs the case on hand, hence the same is extracted below.

> Rule 3. Procedure for appearance of defendant. In a suit to which this order applies, the plaintiff shall, together with the summons under Rule 2, serve on the defendant a copy of the plaint and annexures thereto and the defendant may, at any time within ten days of such service, enter an appearance either in person or by pleader and, in either case, he shall file in Court an address for service of notices on him.
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> (5) The defendant may, at any time within ten days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just:
>
> Provided that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexations:"

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6. The said provision says that the Court has discretion to grant leave and the discretion to be exercised on sound judicial principles. The defendant, by an affidavit or

otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit. The leave to defend may be granted unconditionally or upon such terms as may appear to the Court to be just, provided the Court is satisfied that the facts disclosed by the defendant do indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is not frivolous or vexations.

7. Following the decision reported in (*Sm. Kiranmoyee Dassi v. Dr. J. Chatterjee) AIR 1949 Cal 479*, the Honourable Supreme Court in the decision reported in (M/s. Mechelec Engineers & Manufacturers v. M/s. Basic Equipment Corporation) (1976) 4 Supreme Court Cases 687 = AIR 1977 SC 577 held in para-7 and 8 as follows:-

> 7. We need not dilate on the well established principles repeatedly laid down by this Court which govern jurisdiction of the High Courts under Section 115 CPC. We think that these principles were ignored by the learned Judge of the High Court in interfering with the discretionary order after a very detailed discussion of the facts of the case by the learned Judge of the High Court who had differed on a pure question of fact — whether the defences could be honest and bona fide. Any decision on such a question, even before evidence has been led by the two sides, is generally hazardous. We do not think that it is fair to pronounce a categorical opinion on such a matter before the evidence of the parties is taken so that its effects could be examined. In the case before us, the defendant had denied, inter alia, liability to pay anything to the plaintiff for an alleged supply of goods. It is only in cases where the defence is patently dishonest or so unreasonable that it could not reasonably be expected to succeed that the exercise of discretion by the trial court to grant leave unconditionally may be questioned. In the judgment of the High Court we are unable to find a ground of interference covered by Section 115 CPC.
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> 8. In *Kiranmoyee Dassi Smt* v. *Dr J. Chatterjee* Das, J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by Order 17 CPC in the form of the following propositions (at p. 253):

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"(*a*) If the defendant satisfies the court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.

(*b*) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(*c*) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the court may in its discretion impose conditions as to the time or mode of trial but not as to payment into court or furnishing security.

(*d*) If the defendant has no defence or the defence set-up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(*e*) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence."

In this case, the Honourable Supreme Court has held that only in cases where the defence is patently dishonest or so unreasonable that it could not reasonably be expected to succeed, that the exercise of discretion by the trial court to grant leave unconditionally may be questioned.

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8. In the decision rendered in (State Bank of Saurashtra vs. M/s. Ashit Shipping Services (P) Ltd) AIR 2002 Supreme Court 1993, in Para-13, the Honourable Supreme Court held thus:-

> "13. ....The appellants have made serious allegations of fraud and collusion. They had stated that such a document did not exist in their records. This was not a defence which could be characterised, at this stage, as sham or illusory or practically moonshine. These triable issues should not have been summarily rejected by the trial Court and/or the High Court."

In the above judgment, the appellants have raised serious allegation of fraud and collusion and it is stated that the document set out do not exist in the records. While dealing with the said allegation, the Honourable Supreme Court held that the defence set up by the defendant cannot be characterised, at this stage, as sham or illusory or practically moonshine and these triable issues should not have been rejected by the trial court or high court.

9. In the decision reported in (Mrs. Raj Duggal v. Ramesh Kumar Bansal) AIR 1990 Supreme Court 2218, the Honourable Supreme Court held in para-3 as follows:-

> "3. Leave is declined where the court is of the opinion that the grant of leave would merely enable the defendant to prolong the litigation by raising untenable and frivolous defences. The test is to see whether the defence raises a real issue and not a sham one, in the sense that if the facts alleged by the defendant are established there would be a good or even a plausible defence on those facts. If the court is satisfied about that leave must be given. If there is a triable issue in the sense that there is a fair dispute to be tried as to the meaning of a document on which the claim is based or uncertainty as to the amount actually due or where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross-examine his witnesses leave should not be denied. Where also, the defendant shows that even on a fair probability he has a bona fide defence, he

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> ought to have leave. Summary judgments under Order 37 should not be granted where serious conflict as to matter of fact or where any difficulty on issues as to law arises. The court should not reject the defence of the defendant merely because of its inherent implausibility or its inconsistency.

In the above case, the Honourable Supreme Court held that the defendant shows that even on a fair probability he has a bonafide defence and he ought to have leave. Summary judgment under Order 37 should not be granted where serious conflict of matter of fact or where any difficulty on issues of law arises. The Court should not reject the defence of the defendant merely because of its inherent implausibility or its inconsistency.

10. Following the above judgments of this Court and the Apex Court, I proceed to deal with the facts involved in this case.

11. The respondent herein has issued notice dated 15-09-2001, prior to filing of the suit, calling upon the revision petitioner to pay the amount. The notice was received by the petitioner herein but he has not chosen to give any reply. It is stated by the petitioner that the execution of the promissory note is admitted but the same was executed in favour of one Gulecha; that he discharged the entire amount payable under the Promissory note to Gulecha; that after his return from Kerala he tried to get back the promissory note from the legal heirs of Gulecha since he was dead, but it became vain. In respect of the said allegations, the trial court found that the petitioner has not placed any materials to support his case and no valid defence or triable issue established by the petitioner to consider grant leave. In my view, for the aforesaid reasons, leave to defend could not be granted. The court below is right in dismissing the application filed by the revision petitioner.

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12. In the result, the civil revision petition is dismissed. No costs. consequently, connected CMP is closed.

17-01-2005

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Asst.Registrar

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Sub Asst.Registrar

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To

The Registrar,
City Civil Court
Chennai

1 cc to Mr.G.Dhesingu, Advocate, SR.1860

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